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# Water Infrastructure Bill Could Upend Texas' Water Planning Process

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The water [infrastructure bills](#) that the legislature passed last session – and that have to be approved by voters under [Proposition 6](#) in the [November 5](#) special election to take full effect – have received a lot of [press coverage](#), with most attention being given to the jaw-dropping [sums](#) of money involved.

As with all estimates – particularly complex ones that peer far into the future and require the consultation of many crystal balls – these 10-digit-and-up figures include numerous nuances, assumptions, caveats, judgment calls, and blind spots. (For an excellent look under the hood of the estimates, check out this [blog](#) from the [Texas Center for Policy Studies](#).)

But other aspects of the water infrastructure legislation and attendant policy debate have received less play. That could be because the legislation – particularly H.B. 4 – is arcane in parts and dense throughout, and some of its key sections have an elusive, shifting, tough-to-pin-down quality.

A lot of hard-thinking and horse-trading went into the legislation, and it is probably safe to assume that the more blackbox-like provisions were designed to give the [Texas Water Development Board](#) (the agency responsible for implementing the new laws) the flexibility needed to tackle a policy problem that is itself somewhat blackbox-like.

Of course, the flipside of flexibility is uncertainty, and H.B. 4 offers that in spades. Precisely what kind of financial assistance will be provided under the bill? Under what timetable? Who will be the most likely beneficiaries? How long exactly will the klieg-lit \$2 billion appropriation last? On these questions, there are probably a lot of reasoned opinions, educated guesses, and well-informed speculations – all of them equally valid, none of them worth betting the farm on.

Nevertheless, to these I'll add one more: H.B. 4 will completely upend the water planning process the state has followed since the late 1990s. (Like most beliefs, this one is borrowed. Credit for the insight goes to the Energy Center's executive director, [Melinda Taylor](#), who knows well the evolution and convolutions of Texas water law.)

## Roots of Texas Water Planning

In a recent [Texas Tech Administrative Law Journal](#) article, Houston assistant [city attorney](#) Augustus Campbell observed that “[w]ater law and water planning are remarkably old. Authors, like Jared Diamond, have hypothesized that water planning is one of the critical factors in the success or failure of any human civilization.”

So it is that generations of Texas lawmakers have continuously tried to improve not just water quality, water access, or water supply, but also water *planning* – a process, a paper endeavor, a bureaucratic exercise (albeit one with long-range ramifications).

The 2012 [State Water Plan](#) (SWP) reviews the history of water planning in this state. The *Reader's Digest* version is that modern water management began in the late 1800s, formal water planning began in the 1950s (inspired by the drought of record and concurrent with the formation of the TWDB) and was reconfigured in the late 1990s.

The Water Planning Act of 1957, as the 2012 SWP recounts, “created the Texas Water Resources Planning Division of the Board of Water Engineers, which was assigned the responsibility of water resources planning on a statewide basis.” The state published its first SWP in 1961 and produced subsequent SWPs on a somewhat erratic basis (*i.e.*, none in the 1970s, three in the 1990s).

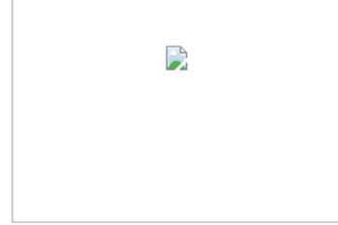
The SWPs were created through a centralized, top-down process and organized according to river basins until 1990, when the SWP projected water supplies and demands for eight geographic regions. In 1997, the state issued an SWP that divided the state further, into a total of 16 regions.

## Planning Under S.B. 1

That same year, in response to a severe drought, the legislature passed [S.B. 1](#), one of those big bills that amount to statutory pivot points. Much like H.B. 4, S.B. 1 inspired superlatives. It was hailed as “landmark legislation”<sup>[1]</sup> Then-Lieutenant Governor (a powerbroker not immune to contemplating his legacy) crowed that “Senate Bill 1 signals the beginning of a new era in which vision will prevail over long-standing differences and territorial feuding.” His general counsel called S.B. 1 “the most exhaustive rewrite of Texas water law in the last thirty years.”

Again, from the 2012 SWP: “Senate Bill 1 outlined an entirely new process where local and regional stakeholders were tasked with developing consensus-based regional plans for how to meet water needs during times of drought. TWDB would then develop a comprehensive state water plan—based on the regional water plans—every five years. One of the most important aspects of the legislation specified that TWDB could provide financial assistance for water supply projects only if the needs to be addressed by the project were addressed in a manner that is consistent with the regional water plans and the state water plan.” *See also* Texas Water Code § 16.053.

The new process quickly attracted stakeholder interest. Even defining the borders of the regions proved contentious, with rural counties trying to distance themselves from fast-growing urban counties that could subsume their interests.



Now, after 16 years with S.B.1 on the books, regional planning has come to define water planning for the state, with the SWP incorporating the regional plans wholesale. The line between regionalization and balkanization is fine, however, and among the regional water plans included in the 2012 SWP are inconsistencies, conflicts, and redundancies. *See TWDB v. Ward Timber*, 2013 Tex. App. LEXIS 6384 (May 23, 2013) (“Region D’s plan had an entire section on the conflict between the Marvin Nichols Reservoir and its negative impacts on the timber industry, other agricultural resources, and economic resources of Region D.”).

## Planning Under H.B. 4

H.B. 4 and Proposition 6 maintain the S.B. 1 planning process but create a new process that could skew it or supplant it in importance. Specifically, if successful, Proposition 6 (in conjunction with H.B. 1025) would appropriate \$2 billion from the Economic Stabilization Fund (better known as the Rainy Day Fund) to the State Water Implementation Fund for Texas (SWIFT), where the money could only be used to provide financial assistance for projects in the SWP.

The 2012 SWP, by its own calculations, includes about \$53 billion worth of projects. SWIFT cannot foot the full costs of those projects – grants are not allowed from SWIFT, nor are loans with interest at less than 50 percent of the market rate – but whatever role the \$2 billion plays (again, uncertainty), it will leave plenty of hungry hands.

To allocate limited SWIFT dollars, H.B. 4 creates a new process for prioritizing projects that would basically work as follows: (1) representatives from each of the regional planning groups created under S.B. 1 would have to form a committee and draft proposed standards for prioritizing projects; (2) the TWDB would have to review and approve the standards; (3) the regional planning groups would then use the standards to rank projects within their jurisdictions; (4) the regional planning groups would submit their rankings to the TWDB; and (5) the TWDB would then...

...fund whichever projects it wanted.

An oversimplification, but not by much. In addition to weighing in on the regional planning group standards, the TWDB would have to establish a “point system” for “projects for which SWIFT financial assistance is sought from the board.” In awarding points, TWDB would have to consider statutorily prescribed primary and secondary factors. (The legislation doesn’t refer to the factors as “primary” and “secondary,” but that’s effectively what they are.)

The prioritization that a regional planning group gives to a particular project is a secondary factor. In fact, of the seven secondary factors listed in H.B. 4, regional prioritization squeaks in at number seven. Nothing in the legislation indicates that one secondary factor should be given more weight than another – there is no prioritization of the prioritizing factors – and the fact that regional prioritization is at the bottom of the page doesn’t have any legal significance.



But it has practical significance to the extent that it hints at what was in the minds of the legislature – which not only drafted, debated and adopted the bill but which will continue to exert significant influence over the administrative implementation of H.B. 4 through the operation of a new advisory committee composed of seven high-ranking elected officials or their designees.

It could be that the TWDB and the SWIFT advisory committee will regularly defer to the local expertise of the regional planning groups, but they do not have to. And in all truth, a legislature that streamlines an agency’s governance, as H.B. 4 does, by replacing six part-time commissioners with three full-time ones, and that assigns several of its members to an oversight panel (a body whose very existence evidences centralization), does not seem like it would be in the mood for delegation and decentralization.

Admittedly, even if a project does not receive SWIFT funding, it will remain in the SWP. But if SWIFT has been anointed the mechanism for implementing the SWP, and it is not used to implement certain projects, how much consolation is it that an unfunded project appears as a line item in the formal SWP? That sort of scenario has an if-the-tree-falls-in-the-forest ring to it.

Some amount of centralization is inevitable and probably desirable from a policy perspective. A regional planning process can help to form consensus but it can also serve as a convenient alternative to compromise by allowing each region to do what it wants within its own silo (as demonstrated by *Ward Timber*).

The inescapable fact is that some parts of the state have more water than others, some need water more than others, some have more money and political clout than others, and some put water to more economically important uses than others. In a sense, the stakes are so high and the resources so limited that there have to be winners and losers. H.B. 4 recognizes that and appoints a new set of referees (the advisory committee, the new board members, and even a new executive director) in that perennial symbol of centralization, the state capital.

 [Texas](#)  [water](#)

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